Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

C. VOLANTE CORP.,

Petitioner,

v.

JOHNNIE BROWN, THEODORE KING, ALDO COLUSSI, GEORGE FINCH, CHESTER BROMAN, JOSEPH FERRARA, FRANK FINKEL, and ANIELLO MADONNA, as Trustees and Fiduciaries of the Local 282 Welfare, Pension, Annuity and Job Training Trust Funds,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Second Circuit err in affirming the United States District Court for the Eastern District of New York's determination that a current, executed collective bargaining agreement is not necessary in order to invoke the District Court's jurisdiction, pursuant to Section 302(c)(5)(B) of the Labor Management Relations Act and Section 515 of the Employee Retirement Income Security Act, as the *Volante* decision is in direct conflict with Second Circuit and Fifth Circuit precedent holding that the existence of a current, executed agreement during the time period for which contributions are sought is necessary to invoke the District Court's jurisdiction and that in the absence of a current agreement, jurisdiction to determine whether an employer is obligated to make post-contract contributions is exclusively vested in the NLRB?

2. Did the United States Court of Appeals for the Second Circuit err in affirming the United States District Court for the Eastern District of New York's determination that an employer may adopt the terms of an unexecuted collective bargaining agreement through a course of conduct as the *Volante* decision is in direct conflict with Second, Third, Fifth, Sixth, Seventh, and Ninth Circuit precedent holding that the District Court lacks jurisdiction to determine whether an employer is obligated to make post-contract contributions after the expiration of a current collective bargaining agreement, pursuant to Section 302(c)(5)(B) of the Labor Management Relations Act and Section 515 of the Employee Retirement Income Security Act, as jurisdiction to make such determination is exclusively vested in the NLRB, and holding that there does not exist a federal common law cause of action for breach of an implied collective bargaining agreement?

3. Did the United States Court of Appeals for the Second Circuit err in affirming the United States District Court for the Eastern District of New York's determination that C. Volante Corp. adopted the terms of the unexecuted collective bargaining agreements based upon C. Volante Corp.'s course of conduct and notwithstanding Second, Third, and Fifth Circuit precedent holding that such conduct is not tantamount to the adoption of an unexecuted collective bargaining agreement?

PARTIES TO THE PROCEEDING

The parties to the proceeding are the Petitioner C. Volante Corp. and the Respondents Johnnie Brown, Theodore King, Aldo Colussi, George Finch, Chester Broman, Joseph Ferrara, Frank Finkel, and Aniello Madonna, as Trustees and Fiduciaries of the Local 282 Welfare, Pension, Annuity and Job Training Trust Funds.

STATEMENT PURSUANT TO RULE 29.6

The petitioner is a New York corporation. The petitioner is not a publicly held company and has no parent companies or nonwholly owned subsidiaries or affiliates.

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Petitioner C. Volante Corp. (herein "Volante"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this matter.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which appears in Appendix A, is reported at 1999 WL 807724, 162 L.R.R.M. (BNA) 2457. The Amended Final Judgment of the United States District Court for the Eastern District of New York and the Opinion and Order of the United States District Court for the Eastern District of New York, which appear respectively in Appendices B and C, are unpublished decisions but the Opinion and Order can be found at 1997 WL 441799.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit was entered on October 8, 1999. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 302(c)(5)(B) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c)(5)(B) and Section 515 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1145 appear in Appendix D.

STATEMENT OF THE CASE

The fundamental question in this matter is whether the Second Circuit properly found that the District Court had jurisdiction to determine whether an employer had an obligation to contribute to an employee benefit fund in the absence of a

signed, current collective bargaining agreement during the time period for which contributions were sought, pursuant to § 515 of ERISA, § 302(c)(5)(B) of the LMRA, and the United States Supreme Court's decision in *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete*, 484 U.S. 539, 108 S. Ct. 830 (1988). Additionally, a question exists as to whether the Second Circuit properly affirmed the District Court's determination that there exists a cause of action for breach of an adopted collective bargaining agreement. Further, the question exists as to whether the Second Circuit properly affirmed the District Court's determination that Volante adopted unsigned agreements through its course of conduct.

The Second Circuit erroneously declined to apply *Advanced Lightweight, supra* which provides that district courts lack subject matter jurisdiction to determine whether an employer has an obligation to make benefit fund contributions for any period subsequent to the expiration of a collective bargaining agreement and holds that the NLRB has exclusive jurisdiction over such disputes. *Id.* at 549. The precedent within the Second Circuit: (a) has held that there is no federal cause of action for breach of an implied contract; (b) has declined to follow an adoption of contract theory; and (c) has found that a current, signed agreement is critical to the Court's jurisdiction. Thus, the Second Circuit erroneously affirmed the District Court's conclusion that the central issue was whether Volante was bound by collective bargaining agreements to which it was not a signatory rather than whether the Court had jurisdiction to determine whether Volante had any obligation to the Funds after the expiration of Volante's last agreement.

Federal jurisdiction was invoked pursuant to ERISA §§ 502(a)(3), 502(d)(1), 502(e), 502(f), and 502(g), 29 U.S.C. §§ 1132 (a)(3), 1132(d)(1), 1132 (e), 1132(f), and 1132(g), and LMRA § 302, 29 U.S.C. § 186.

The Funds are employee benefit plans governed by ERISA and were established pursuant to the terms of various collective bargaining agreements between Local 282 and signatory employers who are required to make contributions to the Funds on behalf of their employees covered by the collective bargaining agreements.

The obligations to the Funds of the signatory employers are set forth in Agreements and Declarations of Trust of the Funds (herein "Trust Agreement"). The Trust Agreement specifically defines "employer" as " 'each employer who has *duly executed* a collective bargaining agreement with the Union.' Trust Agreement at 1, Section 1." (Emphasis added).

Volante is a truck rental company located at 7 Evergreen Avenue, Lynbrook, New York. Rita Volante was the Chief Operating Officer of the company from 1962 until September of 1995, at which point she suffered an incapacitating stroke.

Volante has not been a signatory to any collective bargaining agreement with Local 282 since the expiration of an agreement which was effective from July 1, 1987 through June 30, 1990. Plaintiffs commenced this action to recover benefit fund contributions during the period May 30, 1990 through September 30, 1993. Thus, with the exception of the one month period of May 30, 1990 through June 30, 1990, the Funds have commenced this action to recover contributions for a time during which there was no current collective bargaining agreement in effect.[1]

The Funds audited Volante's books and records and determined that Volante was allegedly delinquent in the payment of contributions in the sum of $78,183.87.

By letter to the Funds dated January 20, 1995, Rita Volante addressed the issue of the alleged deficiency. Ms. Volante

1. At no time did Volante ever sign any Local 282 Trust Agreement.

asserted that Volante had utilized drivers on a temporary basis who were employees of another trucking firm and that she was under the assumption that they were paying there own benefits. While Ms. Volante made reference to an undefined "responsibility to the funds", she pointed out that Volante did not have a signed contract with Local 282 since 1989.[2] The Funds rejected the settlement offer proposed by Ms. Volante.

Notably, by letter dated September 12, 1995, Local 282 Contract Department Representative Kathy Cassel acknowledged the nonexistence of any collective bargaining agreements between Volante and the union during the time period of July 1, 1990 through June 30, 1996 and rejected the application of one of Volante's drivers, Louis Accerio, to join Local 282. Local 282 informed the company that "[a]lthough we are aware that your dues and benefit contributions are paid timely and to date", the application of Mr. Accerio to join the Union was denied because Volante was not a signatory the 1990-1993 and 1993-1996 collective bargaining agreements. Thus, such letter unambiguously informed Volante that Local 282 did not recognize the existence of any collective bargaining agreement during the periods 1990-1993 and 1993-1996.

Moreover, such letter indicated that Volante could chose to "reactivate" its collective bargaining relationship by filling in an effective date and by returning the enclosed contracts to be countersigned by a Local 282 officer. At no time did Volante sign such agreements or "reactivate" such relationship.

Moreover, subsequent to the expiration of the July 1, 1987 through June 30, 1990 collective bargaining agreement, Volante did not adhere to the terms of any subsequent collective bargaining agreement except that during the time period encompassed by the audit Volante voluntarily submitted remittance reports and contributions to the Funds, but did not contribute in accordance with the specific terms of the

2. Volante's last collective agreement expired on June 30, 1990.

agreements. Volante did not pay wages by relying on the specific provisions of the Local 282 agreements, but rather paid the wage rate as provided to them by another contractor for whom Volante did trucking. Volante did not exclusively employ drivers who were members of Local 282. Thus, Volante's conduct was not in compliance with the terms of the 1990-1993 and 1993-1996 agreements.

Thus, it is Volante's position that: (a) the District Court lacked jurisdiction to determine whether Volante had an obligation to contribute to the Funds for a time period during which there was no signed, current collective bargaining agreement in effect; (b) the Second Circuit improperly affirmed the District Court's determination that there exists a claim for breach of an adopted collective bargaining agreement; and (c) Volante's conduct was not tantamount to an adoption of the unexecuted agreements.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED AS THE *VOLANTE* DECISION, HOLDING THAT THE EXISTENCE OF A CURRENT, EXECUTED COLLECTIVE BARGAINING AGREEMENT IS NOT NECESSARY TO INVOKE THE DISTRICT COURT'S JURISDICTION PURSUANT TO THE LMRA AND ERISA, IS IN DIRECT CONFLICT WITH SECOND CIRCUIT AND FIFTH CIRCUIT PRECEDENT HOLDING THAT A CURRENT, EXECUTED AGREEMENT DURING THE TIME PERIOD FOR WHICH BENEFIT FUND CONTRIBUTIONS ARE SOUGHT IS NECESSARY TO INVOKE THE COURT'S JURISDICTION

To invoke the District Court's jurisdiction, §§ 402(a) and 515 of ERISA, 29 U.S.C. §§ 1102(a) and 1145, and

§ 302(c)(5)(B) of the LMRA, 29 U.S.C. § 186(c)(5)(B), require the existence of a current, written collective bargaining agreement during the period for which contributions are sought.

Advanced Lightweight, *supra*, holds that District Courts lack subject matter jurisdiction over claims for contributions allegedly due for any period subsequent to the expiration of a collective bargaining agreement and further holds that the NLRB has exclusive jurisdiction over disputes concerning whether an employer has a continuing obligation to make post-contract contributions. *Id.* at 549. *See also Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 207, 111 S. Ct. 2215 (1991) (the NLRB has jurisdiction over any failure to make contributions after the expiration of a collective bargaining agreement and the District Court lacks jurisdiction under ERISA). The Court in *Advanced Lightweight* found that "the text of § 515 plainly describes the employer's contractual obligation to make contributions but omits any reference to a noncontractual obligation imposed by NLRA," *Id.* at 546. Section 515 "is limited to the collection of 'promised contributions', and does not confer jurisdiction on district courts to determine whether an employer's unilateral decision to refuse to make post-contract contributions constitutes a violation of the NLRA." *Id.* at 548.

Within the Second Circuit, *Advanced Lightweight* has been followed. In *United Automobile, Aerospace & Agricultural Implement Workers of America, Local 33 v. R.E. Dietz Co.*, 996 F.2d 592, 597 (2nd Cir. 1993), the Second Circuit, following *Advanced Lightweight*, found that without a current agreement, no "promised contributions" existed. Federal court jurisdiction did not exist under ERISA § 502, but jurisdiction was found to be exclusively vested in the NLRB. *Dietz*, *supra* at 597.

Further, in *Derrico v. Sheehan Emergency Hospital*, 844 F.2d 22, 25 (2nd Cir. 1988) the Court found that when the Complaint alleges a cause of action for a period after the

expiration of a collective bargaining agreement, the Court lacks jurisdiction pursuant to LMRA § 301. The Court found that § 301 has no application without a currently effective collective bargaining agreement. *Id.* at 24.

Significantly, in *Moglia v. Geoghegan*, 403 F.2d 110, 118 (2nd Cir. 1968), the Second Circuit found that without a signature on the collective bargaining agreement, a "written agreement" under § 302(c)(5)(B) does not exist. *Moglia*, noted that LMRA § 302 provides that any payment made to a trust fund is forbidden unless "the detailed basis on which such payments are to be made is specified in a written agreement with the employer." *Id.* at 116. *Moglia* specifically rejected the appellant's contention that LMRA § 302(c)(5)(B) does not require a signed, written agreement and held that "[w]e do not agree with appellant's analysis." *Id.* at 118.

Additionally, the Second Circuit's decision in *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310 (2nd Cir. 1990), *cert. denied*, 498 U.S. 982 (1990), noted that jurisdiction in the District Court pursuant to ERISA exists "once an employer *knowingly signs* an agreement that requires him to contribute to an employee benefit plan . . ." (Emphasis added). *Id.* at 314. Further, *Benson*, citing *Advanced Lightweight*, notes that "an employer's liability . . . is not limitless because an employer is liable under § 515 only for the effective period of the collective bargaining agreement." *Id.* at 316.

Volante was not a party to a collective bargaining agreement with Local 282 during the time period for which contributions are sought. Further, after the expiration of the 1987-1990 agreement, the only correspondence Volante received from Local 282 regarding the existence, or lack thereof, of a contract was the September 12, 1995 letter which admitted the non-existence of a collective bargaining relationship since June 30, 1990 because Volante had not signed the subsequent agreements and stated that the agreement could only be "reactivated" by filing

in an "effective date." Thus, such letter unambiguously informed Volante that Local 282 did not recognize the existence of any collective bargaining agreement during the periods 1990-1993 and 1993-1996.

As the Funds seek contributions for a period wherein there was no current, signed collective bargaining agreement in effect, the NLRB has exclusive jurisdiction, pursuant to *Advanced Lightweight* and its Second Circuit progeny. Thus, the Second Circuit improperly affirmed the District Court's conclusion that it had jurisdiction to determine whether Volante had an obligation to contribute subsequent to the expiration of the 1987-1990 agreement.

The Second Circuit in *Volante* recognized that *Advanced Lightweight* holds that §§ 502(g) and 515 of ERISA do not confer subject matter jurisdiction over claims to determine whether an employer's unilateral decision to refuse to make post-contract contributions constitutes a violation of the NLRA,[3] but only confers subject matter jurisdiction for "promised contributions" pursuant to a current, effective collective bargaining agreement. However, the Second Circuit in *Volante* incorrectly found that such holding "stands only for the unremarkable proposition that the [NLRB] generally has exclusive jurisdiction over unfair labor practice claims." (App. A at 5a). While *Volante* noted that "it is true that the Trustees' claims arise from appellant's alleged failure to contribute to the Fund after the signed CBA expired," the Court incorrectly determined that "this does not render them per se unfair labor practice claims over which the district court lacks jurisdiction under *Advanced Lightweight*." (App. A at 6a).

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3. An employer's unilateral decision to refuse to make post-contract contributions may constitute a violation of the NLRA, specifically, an unfair labor practice for refusal to bargain in good faith by failing to make such post-contract contributions before negotiations for a new contract reach impasse.

The Second Circuit incorrectly premised this conclusion by noting that the Trustees did not claim that Volante refused to bargain by making unilateral changes before reaching impasse, but claimed, pursuant to ERISA § 515, that Volante allegedly adopted two collective bargaining agreements that it did not sign. (App. A at 6a). However, the Court in *Advanced Lightweight* found that it is irrelevant that a fund does not institute the action pursuant to the NLRA alleging an employer's alleged failure to maintain the status quo.

In *Advanced Lightweight*, the lawsuit for contributions allegedly owing for a time period after the expiration of a collective bargaining agreement was instituted pursuant to §§ 502(g)(2) and 515 of ERISA and § 8(a)(5) of the NLRA. *Id.* at 539. The Court found that the District Court did not have jurisdiction and held that "[a]s a general rule, federal courts do not have jurisdiction over activity that is 'arguably subject to . . . § 8 of the [NLRA],' and that they 'must defer to the exclusive competence of the [NLRB].' " *Id.* at 539 n.4, 552.

Accordingly, the Court in *Volante*, *supra* failed to follow *Advanced Lightweight*, as well as the Second Circuit's own decisions in *Dietz* and *Derrico*, holding that the NLRB has exclusive jurisdiction over disputes concerning whether an employer has an obligation to make post-contract contributions.

Moreover, the Court in *Volante* failed to follow the Second Circuit precedent established in *Moglia*, *supra*, holding that without a signature on the collective bargaining agreement, a "written agreement" under § 302(c)(5)(B) does not exist. *Id.* at 118. The Court in *Volante* erroneously found that the subsequent unsigned collective bargaining agreements constituted a "written agreement" under LMRA § 302(c)(5)(B). (App. A at 8a). *Volante*, *supra* erroneously holds that the statutory language of § 302(c)(5)(B) only requires that an agreement be written, but not signed. (App. A at 8a). In incorrectly holding same, *Volante*, *supra* ignored that *Moglia*, *supra* extensively discussed

Congress' purpose behind § 302(c)(5) in determining that a signature on the agreement is required for it to constitute a "written agreement." *Moglia, supra* found that "[o]ur construction of § 302 may work a hardship in the instant case . . . but we consider the construction of the statute that we have adopted is the only acceptable one in light of the congressional history and intent." *Id.* at 116.

Accordingly, the Second Circuit's citation of the out of Circuit decisions in *Gariup v. Birchler*, 777 F.2d 370, 375 (7th Cir. 1985) for the proposition that § 302(c)(5)(B) does not require a signed, unexpired collective bargaining agreement and *Moriarty v. Lewis Funeral Directors*, 150 F.3d 773, 777 (7th Cir. 1998) for the proposition that § 302(c)(5)(B) permits an employer to adopt a collective bargaining agreement by a course of conduct, and that a signature is unnecessary, directly conflicts with prior Second Circuit precedent in *Moglia* and *Benson, supra.*

Significantly, the Fifth Circuit's decision in *Firesheets v. A.G. Building Specialists, Inc.*, 134 F.3d 729 (5th Cir. 1998) adheres to the signature requirement set forth in *Moglia.* In *Firesheets, supra,* involving an employer's alleged obligation to make post-contact contributions, the Court cited *Moglia* as the "lead case . . . on this point" and held that a written agreement under § 302(c)(5)(B) does not exist without a signature on the collective bargaining agreement. *Firesheets, supra* at 732. The Fifth Circuit noted that a contrary finding ". . . would not only be inconsistent with precedent, but would undermine the congressional intent for § 302(c) . . ." *Id.*

Additionally, the Court in *Volante, supra* incorrectly found that the Second Circuit's decision in *Moglia* only rejected the appellant's claim as the employer in *Moglia* did not engage in conduct manifesting an intent to adopt the terms of the agreement. (App. A at 8a). Rather, the *Moglia* decision rejected the appellant's claim based upon the fact that LMRA

§ 302(c)(5)(B) requires a signed, written agreement. *Id.* at 118. Moreover, the Court in *Volante*, in attempting to distinguish the instant matter from *Moglia*, found that a distinction should be made as the employer in *Moglia* "did not appear to be willing to accept [the] terms [of the unsigned CBA] at any time." (App. A at 8a). However, in *Moglia*, the Second Circuit made such a finding although the employer continued to pay scale wages and contribute to the Local 282 Funds in accordance with the terms of the unsigned agreement. *Id.* at 118. Accordingly, Volante's conduct should not be found to be a substitute for a current, signed agreement as the Court in *Moglia* found that the existence of a current, signed agreement is necessary to invoke the District Court's jurisdiction.

Additionally, in attempting to distinguish the instant matter from *Moglia*, the Court below erroneously found that in *Moglia* "[the Second Circuit] held that an unsigned, written agreement between a union and a trust fund did not comply with § 302(c)(5)(B) when the union and the trust fund 'never' had a signed CBA detailing the basis upon which payments were to be made." (App. A at 8a). However, the Second Circuit in *Moglia* did not discuss the signature requirement in conjunction with the prior lack of an agreement. *Id.* at 114-115, 116. *Moglia*, *supra* clearly holds that no "written agreement" under § 302(c)(5)(B) exists without a signature, regardless of whether or not there was a prior, signed agreement. *Id.* at 118.

Moreover, the fact that an expired, signed agreement was in existence has been found to be irrelevant pursuant to the Second Circuit's prior decision in *Derrico*, *supra*, wherein the Court specifically found that ". . . the expired CBA could not support an exercise of jurisdiction under [LMRA] § 301" and that "we conclude that *the CBA must be considered defunct upon its expiration for all purposes* except definition of the status quo." *Id.* at 24, 27. *See also Dietz*, *supra* at 595 ("Section 301 has no application in the absence of a currently effective collective bargaining agreement"); *Hanley v. Herrill Bowling*,

No. 94 Civ. 4611, 1995 WL 428996, *2 (S.D.N.Y. July 20, 1995) (funds have no claim pursuant to an expired agreement under ERISA or the LMRA); *Brown v. Dominic Prisco Transport*, No. 95 Civ. 1121, 1997 WL 1093463, *6-8 (E.D.N.Y. August 16, 1997) (an expired agreement does not satisfy written agreement requirement). Moreover, in *Firesheets*, *supra*, the Fifth Circuit held that a prior, signed agreement's ". . . previous existence does not make a difference . . ." as "[t]he old Agreement was dead." *Id.* at 732.

Moreover, the Local 282 Fund Trust Agreement specifically defines "employer" as "'each employer who has *duly executed* a collective bargaining agreement with the Union.' Trust Agreement at 1, Section 1." (Emphasis added). Further, the Trust Agreement provides that it is "made and entered. . .between Local 282 . . . and Companies who are *signatories* hereto and who are hereinafter collectively referred to as *Employers*." (Emphasis added). Further, the Audit Resolution mandates that solely employers who are *signatories* to the collective bargaining agreement are obligated to be audited, and provides that, "[t]he Trustees construe the 'pertinent books and records of an Employer'. . . to include books and records of any business which is bound by a collective bargaining agreement with Local 282 which requires contributions to any of the Funds ("*Signatory*") . . ." (Emphasis added). Therefore, the Trustees themselves have defined an "Employer" as one who is bound by both the terms of a signed collective bargaining agreement and a signed trust agreement.

Volante has not been a party to a collective bargaining agreement with Local 282 since June 30, 1990. Volante has *never* been a signatory to the Trust Agreement, or any amendments thereto. Thus, pursuant to such agreements' signature requirements, Volante is not bound by such agreements, and the Second Circuit incorrectly held that the District Court had jurisdiction.

With respect to the September 12, 1995 letter from Local 282 which admitted the non-existence of a collective bargaining relationship since June 30, 1990 as Volante had not signed the subsequent agreements, the Court in *Volante* erroneously found that such letter did not demonstrate that Volante was not bound by the unsigned agreements. (App. A at 10a). The Second Circuit concluded that "[t]his letter states, however, only what is undisputed — that the CBAs are unsigned," but failed to recognize that the Funds' own Trust Agreement specifically defines an "employer" who is bound to a collective bargaining agreement as an employer who has *duly executed* a collective bargaining agreement with the Union. (App. A at 10a). Thus, Local 282's letter pointing out that Volante did not have a current, signed agreement demonstrates that the District Court lacked jurisdiction.[4]

Furthermore, the Court in *Volante*, *supra* incorrectly held that Rita Volante's letter to the Trustees wherein she made reference to an unspecified "responsibility to the funds" was sufficient to establish an "adoption" of the collective bargaining agreements. (App. A at 9a). In *Dietz*, *supra*, wherein the alleged contract was based upon an employer's letter, the Second Circuit rejected the proposition that an employer's letter constitutes a "contract covered by § 301" of the LMRA. *Id.* at 592. Moreover, the Court in *Volante* noted that Rita Volante, in such letter, stated that Volante did not have a signed contract with Local 282 since 1989.[5] (App. A at 4a, 10a). However, the Second Circuit

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4. The Funds have never provided *any* evidence that Local 282 believed that they were a party to the 1990-1993 and 1993-1996 agreements. By virtue of Local 282's letter dated September 12, 1995, there is evidence to the contrary. The Second Circuit's assertion that the letter only reiterates the fact that the agreements were unsigned is illogical. Had Local 282 believed that valid agreements existed, they would have had no incentive to request that Volante execute the agreements.

5. The agreement expired on June 30, 1990.

erroneously concluded that Rita Volante's notation of same did not "undermine the evidence of appellant's intent to adopt the unsigned CBAs but points out only the undisputed fact that the two CBAs effective from July 1, 1990 through June 30, 1996 were not signed by appellant." (App. A at 10a). As noted above, the Funds' own Trust Agreement specifically defines an employer who is bound to a collective bargaining agreement as an employer who has *duly executed* a collective bargaining agreement with the Union. Thus, pursuant to the agreements' signature requirements, Rita Volante's letter stating that Volante did not have a current, signed agreement demonstrates that Volante did not intend to adopt the collective bargaining agreements and that the District Court lacked jurisdiction.

Thus, the Court in *Volante* erroneously failed to find that the District Court lacks subject matter jurisdiction to determine whether an employer has an obligation to contribute to a fund subsequent to the expiration of a current, signed collective bargaining agreement. This decision causes there to exist a conflict with regard such issue within the Second Circuit, and between the various Circuits.

As the Second Circuit's decisions in *Moglia*, *Benson*, *Derrico*, and *Dietz*, *supra*, as well as the Fifth Circuit's decision in *Firesheets*, *supra*, follow *Advanced Lightweight* and hold that the District Court lacks jurisdiction over claims for contributions allegedly due and owing pursuant to ERISA and the LMRA in the absence of a current, signed collective bargaining agreement, the Second Circuit's decision in *Volante*, holding that a signature may not be necessary, has caused a conflict within the Second Circuit, and between the Second Circuit and the Fifth Circuit, which must be addressed and reconciled. Moreover, given the Second and Fifth Circuits' aforementioned decisions in contrast to the Seventh Circuit's decisions in *Moriarty* and *Gariup*, *supra*, holding that a signed agreement is not necessary in order to invoke the District Court's

jurisdiction, the conflict between the Second, Fifth, and Seventh Circuits must be resolved.

II.

THE PETITION SHOULD BE GRANTED AS THE *VOLANTE* DECISION IS IN DIRECT CONFLICT WITH SECOND, THIRD, FIFTH, SIXTH, SEVENTH, AND NINTH CIRCUIT PRECEDENT HOLDING THAT THE DISTRICT COURT LACKS JURISDICTION PURSUANT TO ERISA AND THE LMRA AFTER THE EXPIRATION OF A CURRENT COLLECTIVE BARGAINING AGREEMENT AND THAT THERE DOES NOT EXIST A FEDERAL COMMON LAW CAUSE OF ACTION FOR BREACH OF AN IMPLIED COLLECTIVE BARGAINING AGREEMENT

As set forth above, the Court in *Volante*, *supra* erroneously declined to follow *Advanced Lightweight*, *supra*, wherein the Supreme Court held that District Courts lack subject matter jurisdiction over claims for contributions allegedly due for any period subsequent to the expiration of a collective bargaining agreement, and that the NLRB has exclusive subject matter jurisdiction over disputes regarding whether an employer has a continuing obligation to make post-contract contributions. *Id.* at 549. As set forth herein, the Second Circuit has followed *Advanced Lightweight*. *Dietz*, *supra* at 597; *Derrico*, *supra* at 24. However, the Second Circuit in *Volante* failed to follow the *Dietz* and *Derrico* decisions, both holding that a claim for post-contract contributions cannot create a federal common law claim for breach of implied contract. *Dietz*, *supra* at 597-598; *Derrico*, *supra* at 25. Accordingly, the *Volante* decision, which erroneously holds that the District Court may have jurisdiction over claims for contributions subsequent to the expiration of a collective bargaining agreement, causes there to exist a conflict regarding such issue within the Second Circuit, and between the Second Circuit and other Circuits.

Derrico, *supra*, holds that a claim for breach of an implied contract is preempted by the NLRA and that a contrary result would limit the parties' post-expiration options of resorting to "economic weapons" when the parties reached an impasse in negotiations. *Id.* at 29. The Court held that "[t]he possibility that a term of an expired CBA might become an 'implied' contract . . .would tie the parties' hands in a manner inimical to this facet of the NLRA's collective bargaining process." *Id.* As the NLRA prohibits an employer from discontinuing contributions to a fund after the expiration of an agreement unless the employer has bargained to impasse with the union, *Derrico* found that an implied contract could not be derived from the post-expiration maintenance of the status quo required by the NLRA. *Id.*

In *Derrico*, the Court found that

> [the] [e]xpiration of a CBA plainly works a significant change in the parties' relationship . . . [and] the prospect of that change . . . provide[s] the parties with incentives to negotiate. To allow a CBA provision to linger on after the contract's expiration in the form of an implied contract would dilute these effects. Trivializing the parties' agreed termination mechanism in this manner would also trivialize the very freedom of contract that is a fundamental policy of the NLRA . . .

Derrico, *supra* at 29; *Prisco*, *supra* at *7.

The Second Circuit in *Dietz*, *supra*, held that a post-expiration denial of benefits cannot create a federal common law claim for breach of implied contract. *Dietz*, *supra* at 597-598; *Prisco*, *supra* at *7. *Dietz*, *supra* found that "[t]o recognize appellants' post-expiration breach of implied contract claim under federal common law would usurp the role of the NLRB in resolving disputes arising under § 8(a)(5)." *Id.* at 598.

Moreover, in *Prisco*, *supra*, the District Court rejected the Local 282 Funds' contention that the Defendants had adopted the unsigned agreements through a course of conduct by contributing to the Funds, submitting remittance reports from 1988 to 1993, and paying scale wages. *Id.* at *6. *Prisco* followed *Dietz* and *Derrico* in determining that there is no federal common law cause of action for implied contract. The Court in *Prisco* rejected the out-of-circuit line of cases cited by the Funds for the proposition that an employer may bind itself to an agreement through its course of conduct and held that "[t]he out of circuit cases do not persuade the court." *Id.* at *8.

In concluding that Volante was bound to the 1990-1993 and 1993-1996 collective bargaining agreements by adoption of contract because Volante continued to submit remittance reports, the Court in *Volante* ignored *Smith v. Candler Coffee Corporation*, No. 95 Civ. 10956, 1996 WL 434554 (S.D.N.Y. August 2, 1996), wherein the District Court noted that the NLRA prohibits an employer from discontinuing contributions to a fund after the expiration of a collective bargaining agreement, unless the employer has bargained to impasse with the union. *Id* at *3. *Candler* found that

> [t]o hold . . . that performance of those statutory duties creates an implied contract would require an employer either to violate the law by halting contributions, or to create an implied contract by continuing those contributions. That Hobson's choice is contrary to the fundamental principles of collective bargaining and freedom of contract.

Id. at *4. *Candler*, citing *Derrico* and *Dietz*, noted that for this reason, the Second Circuit held that a claim of implied contract is preempted by ERISA and that post-expiration maintenance of the status quo cannot create an implied contract under federal common law. *Id.*

In *Moglia*, the Second Circuit rejected the adoption by conduct theory. *Id.* at 118. The Court found that an employer's adherence to the terms of an unexecuted Local 282 agreement, including the payment of contributions and scale wages, did not amount to an adoption of the agreement. *Id.* at 118.[6]

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6. Moreover, the District Courts within the Second Circuit have held that District Courts do not have jurisdiction over claims for post-contract contributions. In *Candler Coffee*, *supra*, the Court followed *Advanced Lightweight* and noted that, "federal court jurisdiction exists under ERISA § 502 only when the employer's duty to make payments to a pension fund derives from a contract" and that "the fiduciary of a fund may seek federal court relief only for 'the collection of promised contributions.' " *Candler*, *supra* at *2. "ERISA does not confer jurisdiction on the district courts to determine whether an employer's refusal to make contributions to a protected plan violates the duty to bargain in good faith; those issues are within the exclusive competence of the NLRB." *Id.* Moreover, in *Prisco*, *supra*, the Court, following *Advanced Lightweight*, held that "employer liability under ERISA is limited to 'promised contributions' " and declined to find a cause of action in the absence of a current collective bargaining agreement. *Prisco*, *supra* at *8.

Further, in *Hanley v. Orient Beach Club, Inc.*, No. 96 Civ. 4478, 1998 WL 65990 (S.D.N.Y. February 18, 1998), the District Court followed *Advanced Lightweight* and held that the NLRB is vested with exclusive jurisdiction over actions to collect contributions during the post collective bargaining period. *Orient Beach*, *supra* at *6. The Court, citing *Alston v. Quik Park Garage Corp.*, No. 97 Civ. 0067, 1997 WL 795790 (S.D.N.Y. December 30, 1997), found that

> employers do not have a duty under ERISA to make trust fund contributions after the expiration of the collective bargaining agreement . . . Thus, if a trust fund wishes to commence litigation to recover unpaid contributions for a period of time not covered by any collective bargaining agreement, the action must be brought before the NLRB . . .

Orient Beach, *supra* at *6. The Court, citing *Mason Tenders District Council Welfare Fund v. ITRI Brick and Concrete*, No. 96 Civ. 6754,

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1997 WL 678164 at *3-4 & n.4 (S.D.N.Y. October 31, 1997), found that the " 'NLRB has exclusive jurisdiction to determine if an employer's conduct constitutes an unfair labor practice,' including where [an] employer stops post-CBA contributions to a pension fund before impasse." *Orient Beach*, *supra* at *6.

Moreover, in *Herrill*, *supra*, the Court, citing *Dietz* and *Advanced Lightweight*, held that employer liability pursuant to § 515 of ERISA and § 301 of the LMRA is limited to "promised contributions" under a current agreement and that the funds could not bring a claim for contributions after the expiration of the agreement. *Herrill*, *supra* at *2. The Court found that the Funds' sole remedy was the NLRA § 8(a)(5) and that the NLRB had exclusive jurisdiction over this claim. *Id.* at *4.

In *Associated Wrecking, Inc. v. Local 95 Pension Fund*, No. 92 Civ. 1841, 1994 WL 118987 (S.D.N.Y. March 31, 1994), the Court held that an alleged failure to make contributions after the expiration of a collective bargaining agreement does not state a cause of action under § 301 of the LMRA, but may state a claim of an unfair labor practice, and would fall under the jurisdiction of the NLRB. *Id.* at *2.

In *Wenzel v. Edison Parking*, No. 94 Civ. 1971, 1995 WL 135553, *2 (S.D.N.Y. March 29, 1995), the Court held that district courts lack jurisdiction to determine whether an employer's unilateral decision to refuse to make post-contract contributions violates the NLRA. *Id.* at *2.

In *Wenzel v. Jeff Parking*, Nos. 93 Civ. 5071, 94 Civ. 0831, 1995 WL 258055 (S.D.N.Y. May 3, 1995), the Court, citing *Moglia*, noted that LMRA § 302 provides that an employer may only make contributions where "the detailed basis on which such payments are to be made is specified in a written agreement with the employer." *Jeff Parking*, *supra* at *2. The court determined that because there was no current agreement in existence, a written agreement, pursuant to § 302 of the LMRA, did not exist. *Id.* at *4. The District Court, following *Advanced Lightweight*, found that "this Court could have no authority to hear such a case." *Jeff Parking*, *supra* at *4, n.6.

(Cont'd)

Thus, the Court in *Volante* was in error in affirming the District Court's determination that Volante adopted the 1990-1993 and 1993-1996 Local 282 agreements through its course of conduct.

Further, the Second Circuit's citation in *Volante* to *Baskin v. Hawley*, 807 F.2d 1120 (2nd Cir. 1986) for the proposition that District Courts have jurisdiction over cases wherein agreements are allegedly "adopted" is misplaced. The *Baskin* decision upheld a "jury verdict premised on [a] finding that [an] employer's conduct manifested adoption of the CBA." (App. A at 9a). Such decision makes no reference to ERISA, the LMRA, or the NLRA in its discussion pertaining to the alleged adoption of the agreement. *Id.* at 1128-1129. Moreover, the jury found that the employer was bound to the agreement as a *signatory* and by demonstrating a clear intent to be bound by it in its *entirety*. *Id.* at 1127-1129. Significantly, the *Baskin* decision predates the *Dietz* and *Derrico* decisions and clearly conflicts with the Second Circuit's later holdings in such cases that there exists no federal common law cause of action for breach of an implied collective bargaining agreement. Thus, the *Baskin* case does not support the Second Circuit's conclusion in *Volante* that the District Court has jurisdiction wherein an unexecuted agreement is allegedly "adopted."

Accordingly, as the Second Circuit's decisions in *Dietz*, *Derrico*, and *Moglia* hold that the there is no federal cause of

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In *Brown v. J.F.H. Mak Trucking, Inc.*, No. 95 Civ. 2118, 1999 WL 1057274 (E.D.N.Y. November 8, 1999), which was decided subsequent to the Second Circuit's decision in *Volante*, the District Court followed *Advanced Lightweight* in holding that it lacked jurisdiction over the Local 282 Funds' claims against an employer for a time period subsequent to the employer's last signed collective bargaining agreement with Local 282. *J.F.H. Mak*, *supra* at *3. The District Court held that a fund may only commence an action in federal court pursuant to ERISA to collect "promised contributions" which are specified in a current, signed collective bargaining agreement. *Id.* at *2-3.

action for breach of an implied collective bargaining agreement and that employers may not adopt collective bargaining agreements through their conduct, the *Volante* decision has caused a conflict within the Second Circuit which must be addressed and reconciled.

Moreover, due to the Court's *Volante* decision, declining to hold that the NLRB has exclusive jurisdiction over claims for contributions allegedly due for a period after the expiration of a collective bargaining agreement, there now exists a conflict regarding such issue between the Circuits. Other circuits have held that the District Court lacks jurisdiction over claims for contributions for a period after the expiration of an agreement and have declined to find a cause of action for adoption of a subsequent unexecuted contract.

In *Empire Excavating v. American Arbitration Association*, 693 F. Supp 1557 (M.D. Pa. 1988), *aff'd without op.*, 866 F.2d 1409 (3rd Cir. 1988), the District Court held that "the existence of a collective bargaining agreement between the parties to [the] action is critical to the court's jurisdiction" and that "[a]bsent a contract, jurisdiction over the relations between an employer and the representative of its employees is vested in the NLRB . . ." *Id.* at 1560, 1563.

In *UA Local 343 of the United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industries v. Nor-Cal Plumbing*, 48 F.3d 1465, 1470-1471 (9th Cir. 1995), the Court found that ERISA provides no jurisdiction to enforce an employer's post-contract obligation to contribute under the NLRA. *See also Collins v. Pension and Insurance Committee of the Southern California Rock Products and Ready Mixed Concrete Associations*, 144 F.3d 1279, 1283-1284 (9th Cir. 1998) (after the expiration of an agreement, a fund has no claim under ERISA but must file an unfair labor practice charge with the NLRB).

In *International Association of Bridge, Structural and Ornamental Iron Workers v. SR Industries*, No. 90 Civ. 1071, 940 F.2d 665, 1991 WL 151901, *4 (7th Cir. 1991), the Court found that the NLRB has exclusive jurisdiction over claims for contributions following the expiration of a collective bargaining agreement.

In *Lattin v. Kurdziel Iron of Rothbury, Inc.*, No. 96 Civ. 2558, 145 F.3d 1332, 1998 WL 252743, *1 (6th Cir. 1998), the Court found that an action to enforce the terms of an expired agreement is preempted by the primary jurisdiction of the NLRB.

In *Firesheets, supra*, the Fifth Circuit held that the continued payment of contributions and submission of remittance reports for ten years does not evidence an intent to be bound by the terms of a subsequent unexecuted agreement. *Id.* at 732.

Accordingly, the conflict between the Second Circuit's decision in *Volante* and the aforementioned Third, Fifth, Sixth, Seventh, and Ninth Circuits' decisions must be examined and resolved, especially because the Second Circuit's decisions in *Dietz* and *Derrico* are consistent with the other Circuits' decisions. Clearly, the majority of cases have held that District Courts lack jurisdiction over claims for post-contract contributions and have declined to find a cause of action for adoption of an unexecuted agreement.

III.

THE PETITION SHOULD BE GRANTED AS THE *VOLANTE* DECISION, HOLDING THAT VOLANTE ADOPTED THE TERMS OF THE UNEXECUTED COLLECTIVE BARGAINING AGREEMENTS, IS UNSUPPORTED BY THE FACTS AND IS IN DIRECT CONFLICT WITH SECOND, THIRD, AND FIFTH CIRCUIT PRECEDENT HOLDING THAT SUCH CONDUCT DOES NOT AMOUNT TO THE ADOPTION OF A COLLECTIVE BARGAINING AGREEMENT

A grant of summary judgment is proper only if there is no genuine issue of material fact. *Hayes v. New York City Department of Corrections*, 84 F.3d 614, 618 (2nd Cir. 1996). *Volante* improperly holds that the Funds demonstrated the absence of a genuine issue of material fact as to whether Volante "adopted" the unsigned collective bargaining agreements. At the outset, this Circuit has already decided that an employer may not "adopt" a collective bargaining through its conduct and that a federal claim for breach of an implied contract is preempted by the NLRA. However, even if conduct was a basis for finding an adoption of contract, Volante's conduct did not indicate an intent to be bound by the unsigned agreements.

The Second Circuit's reliance on out-of-circuit caselaw such as *Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir. 1988) and *Trustees of Atlanta Iron Workers v. Southern Stress Wire Corp.*, 724 F.2d 1458, 1459-60 (11th Cir. 1983) in support of their holding that Volante's conduct amounted to an adoption of the agreement is in direct conflict with later precedent within the Second Circuit and other Circuits holding that an employer's submission of remittance reports, payment of union wages, submission to an audit, and/or employment of union members does not evidence adoption of an unexecuted agreement.

The Court in *Volante* erroneously concluded that because Volante submitted remittance reports for sixty one months, which stated that that they were submitted in accordance with the terms of the standard Industry Agreement with Local 282, such conduct evidenced an adoption of contract. In both *Dietz* and *Derrico*, the Second Circuit held that post-expiration contributions do not create a claim for breach of implied contract. *Dietz*, *supra* at 597-598; *Derrico*, *supra* at 29. Significantly, in *Prisco*, *supra*, following the *Dietz* and *Derrico* decisions' rejection of the theory of breach of an implied contract, the District Court found that the defendants' submission of monthly remittance reports to the Local 282 Funds for over five consecutive years stating "HOURS PAID FOR . . . In Accordance with the terms of the standard Industry Agreement with Local 282, I.B.T." did *not* amount to an adoption of the unexecuted collective bargaining agreements. *Id.* at *6-7.[7] Moreover, in *Moglia*, the Second Circuit found that the payment of contributions does not amount to adoption of the current unsigned Local 282 agreement. *Id.* at 118.

Further, while the unexecuted collective bargaining agreements mandate that contributions must be made for all hours worked, for all employees, Volante merely made voluntary, partial contributions to the Funds. In *Prisco*, *supra*, the District Court specifically held that making "periodic payments to the Funds constitute[s] a unilateral change in the terms of

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7. In *Empire Excavating*, *supra*, after the expiration of a signed agreement, the employer completed a reporting form stating that contributions were being made in conformity with the collective bargaining agreement. *Id.* at 1562. The Court found that this conduct did not evidence adoption of the unexecuted agreement. *Id.* at 1561-62. Further, in *Firesheets*, *supra*, after the expiration of a signed agreement, the employer submitted remittance reports stating that it was bound to the subsequent unsigned agreement. *Id.* at 731. The Court found that this did not evidence adoption of the unexecuted agreement. *Id.*

employment. . ." and found no adoption of the unsigned collective bargaining agreement. *Id.* at 7.[8]

Volante erroneously holds that Volante's alleged payment of union wages evidenced an adoption of the collective bargaining agreements. In *Moglia*, the Second Circuit held that the payment of Local 282 scale wages does not amount to the adoption of the current unsigned agreement. *Id.* at 118. Moreover, in *Prisco*, the District Court found that the payment of Local 282 scale wages does not amount to an implied contract. Id. at *6-7.[9]

The Court in *Volante* erroneously concluded that the continued employment of an employee who was not a Local 282 member did not create a genuine issue of material fact with regard to the Funds' claim that Volante "adopted" the unexecuted agreements. Volante did not exclusively employ union members as Local 282 rejected the membership application of a Volante driver because Volante had not signed the 1990-1993 and 1993-1996 agreements. Such letter unambiguously informed Volante that Local 282 did not recognize the existence of any agreement during these periods. Thus, such circumstances demonstrate that neither Volante nor Local 282 intended to "adopt" such unsigned agreements.

Moreover, *Prisco*, *supra* found that the employer's conduct did not evidence adoption of the unsigned agreement wherein the employer employed Local 282 members subsequent to the expiration of a collective bargaining agreement. *Id.* at *6-7.[10]

8. In *Firesheets*, *supra*, the Fifth Circuit found that the employer's "voluntary" post-contract contributions did not bind the employer to the subsequent unsigned agreement. *Id.* at 731.

9. It also must be noted that Volante paid a wage rate based upon information provided by another contractor for whom Volante did trucking, and did not rely on the unsigned agreements as the source from which Volante obtained the wage rate.

10. In *Empire Excavating*, *supra*, wherein the employer continued to employ union members after the expiration of an agreement, the (Cont'd)

Volante, *supra* erroneously holds that the submission of Volante to an audit evidenced an adoption of the unexecuted agreements. As Volante was still a signatory to an agreement with Local 282 through June 30, 1990, Volante submitted to an audit. The audit ultimately encompassed the time period of May 30, 1990 through September, 30, 1993. As Volante was a signatory during the one month period of May 30, 1990 through June 30, 1990, Volante was obligated to submit to an audit. Thus, Volante's submission to an audit does not evidence adoption of the unsigned agreements.

The *Volante* decision incorrectly found that Rita Volante's letter to the Funds was sufficient "absent contrary evidence" to establish Volante's intent to adopt the unsigned collective bargaining agreements. (App. A at 7a). As set forth herein, Volante has presented evidence contrary to an intent to adopt the agreements; the caselaw within the Second Circuit holds that Volante's alleged conduct does not evidence adoption of the unsigned agreements; and the *Dietz* decision holds that such letter does not constitute a collective bargaining agreement. *Id.* at 592.

Thus, based upon the foregoing, *Volante* erroneously held that there was an absence of a genuine issue of material fact as to whether Volante "adopted" the unexecuted agreements.

Thus, the *Volante* decision is in direct conflict with Second Circuit precedent, and precedent from the Third and Fifth Circuits, holding that conduct of the type which the Funds allege Volante was engaged does not evidence an adoption of unsigned agreements. Such conflict should be resolved.

(Cont'd)
Court found that this conduct did not bind the employer to the terms of a subsequent agreement. *Id.* at 1561-62.

CONCLUSION

The instant matter presents questions of exceptional and ongoing material importance as such issues effect the application of ERISA, the LMRA, and the NLRA to collective bargaining issues and benefit fund contribution issues nationwide. By granting this petition for certiorari, this Court will have the opportunity to determine, so as to promote consistency among the Circuits, the issues of whether a current, executed collective bargaining agreement is critical to the District Court's jurisdiction; whether there exists a cause of action for breach of an implied collective bargaining agreement or an adopted collective bargaining agreement; and whether certain conduct of an employer is tantamount to an adoption of an unsigned agreement.

Accordingly, Petitioner respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED OCTOBER 8, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999
(Argued: September 24, 1999 Decided: October 8, 1999)
Docket No. 99-7109

JOHNNIE BROWN, THEODORE KING, ALDO COLUSSI, GEORGE FINCH, CHESTER BROMAN, JOSEPH FERRARA, FRANK FINKEL, and ANIELLO MADONNA, as Trustees and Fiduciaries of the Local 282 Welfare, Pension Annuity and Job Training Trust Funds,

Plaintiffs-Appellees,

— v. —

C. VOLANTE CORP.,

Defendant-Appellant.

Before:

WINTER, *Chief Judge*,
KEARSE and MCLAUGHLIN, *Circuit Judges*.

* * *

Appendix A

WINTER, *Chief Judge*:

C. Volante Corp. appeals from Judge Gershon's orders granting appellees' motion for summary judgment and awarding damages. Appellant argues that: (i) the district court lacked subject matter jurisdiction over appellees' claims because they arose from an alleged breach of unsigned collective bargaining agreements, (ii) the district court erred in determining that there were no triable issues as to whether appellant manifested its intent to adopt unsigned collective bargaining agreements, and (iii) the district court made several erroneous findings in connection with its damages award. We affirm.

BACKGROUND

Appellant is a New York truck rental company. Appellees are the Trustees of the Local 282 Welfare, Pension Annuity and Job Training Trust Funds (the "Fund"), which were established pursuant to collective bargaining agreements ("CBA") between Building Material Local 282 of the International Brotherhood of Teamsters (the "Union") and various employers.

Appellant was a signatory to a CBA in effect from July 1, 1987 to June 30, 1990. It did not, however, sign two subsequent CBAs, governing the period July 1, 1990 to June 30, 1996. Pursuant to all the CBAs, employers agree to contribute a fixed dollar amount to the Fund contingent upon the number of hours its employees work.

Appendix A

Although appellant did not sign the CBAs effective from July 1, 1990 to June 30, 1996, it submitted monthly remittance reports during this period. These sixty-one reports detailed hours worked by appellant's employees and its contributions to the Fund as determined by the hours worked. Each report was accompanied by the payment calculated in the report. Each of the reports was signed by appellant's then-Chief Executive Officer as "Pres.," and most of them contained a typewritten phrase indicating it was submitted "[i]n Accordance with the terms of the standard Industry Agreement with Local 282, I.B.T."

The parties do not dispute that appellant's payments to the Fund accorded with the rates set forth in the operative CBA. Rather, the Trustees' claim stems from appellant's alleged failure to make payments to the Fund for all of its employees.

The Trust Agreement, incorporated by reference in the CBAs, provides for periodic auditing of an employer's records concerning payments to the Fund. During November and December, 1993, the Trustees conducted an audit of appellant's records covering the period from May 30, 1990 through September 30, 1993. Appellant cooperated in this audit even though most of it concerned months during which appellant was not a signatory to a CBA. The Trustees' resulting audit report showed that appellant owed more than $78,000.00 to the Fund.

After receiving the audit report, Rita Volante wrote to the Trustees on appellant's behalf. She framed the "main issue" as whether appellant owed contributions for work done

by "outside trucks" and noted that "we were under the assumption that they were paying their own union benefits." Volante did not dispute that appellant had an obligation to make payments to the Fund or that it owed contributions for the outside work. Instead, she expressly acknowledged "a responsibility to the funds" that "[w]e are not skirting." Nevertheless, Volante offered only $35,000.00 as the amount appellant could afford and noted, as a thought for consideration, that appellant had not signed a CBA since 1989.

The Trustees rejected appellant's offer and brought the instant suit. Appellant thereafter moved to dismiss the action for lack of subject matter jurisdiction, and appellee moved for summary judgment. Judge Gershon denied appellant's motion to dismiss, granted appellees' summary judgment motion, and referred the case to Magistrate Judge Pohorelsky for an inquest. In a December 22, 1998 Memorandum and Order, Judge Gershon adopted Magistrate Judge Pohorelsky's recommendation to award appellees $248,514.03 in damages, interest, attorney's fees and costs. This appeal followed.

DISCUSSION

a) *Subject Matter Jurisdiction*

Relying on *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988), appellant argues that the district court lacked subject matter jurisdiction over the Trustees' claims for benefit fund contributions owing on work performed during a period when

appellant was not bound by a collective bargaining agreement. We disagree.

The Trustees brought the instant claims pursuant to Sections 502(g)(2) and 515 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1132(g)(2), 1145, and Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. In *Advanced Lightweight*, the Supreme Court held that ERISA Sections 502(g)(2) and 515 do not confer subject matter jurisdiction over claims "to determine whether an employer's unilateral decision to refuse to make post-contract contributions constitutes a violation of the [National Labor Relations Act]." 484 U.S. at 549. According to the Court, Sections 502(g)(2) and 515 confer jurisdiction only over claims for "promised contributions," not over unfair labor practice claims that an employer has refused to bargain in good faith by failing to make post-contract benefit plan contributions before negotiations for a new contract reached an impasse. *See Advanced Lightweight*, 484 U.S. at 548-49. The decision, therefore, stands only for the unremarkable proposition that the National Labor Relations Board generally has exclusive jurisdiction over unfair labor practice claims. *See NLRB v. Katz*, 369 U.S. 736, 743 (1962) (holding that employer's failure to honor terms of expired CBA during negotiations on new CBA constitutes unfair labor practice); *Advanced Lightweight*, 484 U.S. at 543 n.4 ("As a general rule, federal courts do not have jurisdiction over" unfair labor practice claims.) (internal quotation marks omitted); *but see id.* (noting that federal courts have jurisdiction over unfair labor practice claims that are "collateral" to claims over which there is an independent basis for jurisdiction).

Although it is true that the Trustees' claims arise from appellant's alleged failure to contribute to the Fund after the signed CBA expired, this does not render them *per se* unfair labor practice claims over which the district court lacks jurisdiction under *Advanced Lightweight*. The Trustees are not arguing that appellant has unlawfully refused to bargain by making unilateral changes in working conditions before reaching an impasse over a new CBA. Rather, the Trustees claim that appellant promised to contribute to the Fund by adopting the two CBAs that it never signed. Appellees' claims are thus clearly for "contributions [owing] in accordance with the terms and conditions of . . . [a collective bargaining] agreement," 29 U.S.C. § 1145, and "violation[s] of contracts between an employer and a labor organization," 29 U.S.C. § 185(a), over which the district court has jurisdiction. *See Advanced Lightweight*, 484 U.S. at 547 ("The liability created by § 515 may be enforced by the trustees of a plan by bringing an action in federal district court . . . ."); 29 U.S.C. § 185(a).

b) *Summary Judgment*

Appellant next argues that the district court improperly granted summary judgment because there are genuine issues of fact as to whether appellant adopted the two unsigned CBAs. We disagree.

We review the grant of summary judgment *de novo*. *See Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 202-03 (2d Cir. 1995). A moving party is entitled to summary judgment when, after reviewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any

material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 95 (2d Cir. 1998). A dispute is not "genuine" unless "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Trustees satisfied their initial burden to demonstrate the absence of a genuine issue of material fact as to whether appellant adopted the two unsigned CBAs. *See FDIC v. Giammettei*, 34 F.3d 51, 54 (2d Cir. 1994) (noting that "[a] movant for summary judgment 'always bears' . . . 'the initial responsibility of . . . demonstrat[ing] the absence of a genuine issue of material fact' ") (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The sixty-one remittance reports — most of which were expressly submitted "[i]n accordance with the terms of" the CBAs — appellant's cooperation with the audit, its payment of union wages to employees, and Volante's letter to the Trustees acknowledging appellant's "responsibility to the funds," are sufficient, absent contrary evidence, to establish as a matter of law appellant's intent to adopt the two unsigned CBAs. *See, e.g., Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir. 1988) (granting summary judgment to trustee of funds on claim that employer breached adopted agreement; noting, among other things, that employer "paid the union scale . . . and paid (some) pension and welfare contributions"); *Trustees of Atlanta Iron Workers, Local 387 Pension Fund v. Southern Stress Wire Corp.*, 724 F.2d 1458, 1459-60 (11th Cir. 1983) (per curiam) (upholding finding that employer adopted CBA and agreement to contribute to benefit fund; noting employer's payment of union wages, submission of benefit reports, and accession to audit).

Appellant argues that the unsigned CBAs do not satisfy the ERISA Section 302(c)(5)(B) requirement that payments to a trust fund be made pursuant to a "written agreement with the employer." 29 U.S.C. § 186(c)(5)(B). According to appellant, it did not make a "written agreement" to contribute to the Fund after June 30, 1990 because it did not sign the two subsequent CBAs. Appellant's argument, however, overlooks the statutory language. Section 302(c)(5)(B) does not require that an agreement be signed, only that it be "written" and set forth "a detailed basis on which . . . payments are to be made" to a trust fund. *Id.* Accordingly, an unsigned, written agreement satisfies Section 302(c)(5)(B)'s "written agreement" requirement.[1] *See Gariup v. Birchler Ceiling & Interior Co.*, 777 F.2d 370, 375 (7th Cir. 1985) (concluding that a "signed, unexpired collective bargaining agreement between the parties is not required to satisfy section 302(c)(5)(B); rather section 302(c)(5)(B) requires only a 'written agreement' ").

Because there is no dispute that the unsigned CBAs set forth a sufficiently detailed basis on which the payments were

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1. Our decision in *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), is not to the contrary. There, we held that an unsigned, written agreement between a union and a trust fund did not comply with Section 302(c)(5)(B) when the union and the trust fund "never" had a signed CBA detailing the basis upon which payments were to be made. 403 F.2d at 114, 115. We rejected a putative beneficiary's argument that its employer adopted the unsigned agreement because, on the facts of that case, the employer "did not appear to be willing to accept [the] terms [of the unsigned CBA] at any time." *Id.* at 118. We did not, however, graft a signature requirement onto Section 302(c)(5)(B). Unlike the employer in *Moglia*, appellant's conduct manifested an intent to adopt the terms of the unsigned CBAs.

to be made, the only question is whether appellant's conduct manifested an intent to adopt, or agree to, the unsigned CBAs. 29 U.S.C. § 186(c)(5)(B); *see also Baskin v. Hawley*, 807 F.2d 1120, 1128-29 (2d Cir. 1986) (upholding jury verdict premised on finding that employer's conduct manifested adoption of CBA); *Moriarty v. Larry G. Lewis Funeral Dirs. Ltd.*, 150 F.3d 773, 777 (7th Cir. 1998) ("Both § 302(c)(5)(B) and general principles of contract law permit an employer to adopt a collective bargaining agreement by a course of conduct plus a writing . . . a signature at the bottom of the collective bargaining agreement itself is unnecessary."); *Southern Stress Wire Corp.*, 724 F.2d at 1459-60.

As noted above, the Trustees' proffer, absent rebuttal, suffices to show adoption of the CBAs as a matter of law. In response, appellant contends, first, that it did not actually comply with the CBA provisions requiring it to contribute to the Fund. However, appellant concedes that, for the period covered by the audit, it contributed to the Fund at the rate prescribed by the unsigned CBAs. Even with regard to contributions for the "outside" drivers it hired — the issue in this case — Volante's letter to the Trustees manifests appellant's understanding that it was bound to contribute to the Fund on behalf of these employees. The Volante letter thus not only fails to create a genuine issue as to liability, but actually tends to establish adoption of the unsigned CBAs.

Appellant also relies on an affidavit stating that it did not pay its employees' wages based on the CBA but on information supplied to it by one of its customers. There is no dispute, however, that appellant paid its employees the

wage scales set forth in the unsigned CBAs. Similarly, appellant's argument on appeal that it did not post a bond in the amount required by the CBAs is unsupported by any evidence. Neither of these arguments therefore suffices to create a genuine issue of material fact.

Finally, appellant points to a letter from the Union requesting that appellant sign the 1990-1993 and 1993-1996 CBAs. The letter began by stating "we are aware that your dues and benefit contributions are paid timely and to date" but informed appellant that it could not process a Union book for one of appellant's new employees until the CBAs were signed. This letter states, however, only what is undisputed — that the CBAs are unsigned. It does not undercut appellant's conduct indicating that it intended to be bound by the unsigned CBAs.[2]

Moreover, that appellant subsequently hired the employee whom the Union declined to admit as a member does not, in these circumstances, create a genuine issue of material fact. Appellant's hiring of this non-Union employee may have breached the CBAs, but appellant proceeded to contribute to the Fund on behalf of this employee, thus further manifesting its intent to be bound by the CBAs' trust fund provisions.

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2. Similarly, Volante's letter to the Trustees, in which she noted as a "thought[ ] for . . . consideration" that appellant had not been a signatory to a CBA since 1989, does not undermine the evidence of appellant's intent to adopt the unsigned CBAs but points out only the undisputed fact that the two CBAs effective from July 1, 1990 to June 30, 1996 were not signed by appellant.

Appellant has not, therefore, demonstrated the existence of a genuine issue of material fact as to whether its conduct manifested an intent to adopt the unsigned CBAs.

c) *Damages*

Having carefully reviewed the record at the inquest, Magistrate Judge Pohorelsky's final report and recommendation, and Judge Gershon's decision adopting that report, we find no clear error in the district court's findings in connection with its damages award.

Appellant makes three principal challenges to the district court's findings in connection with its damages award, which we address in turn. We review these findings for clear error. *See* Fed. R. Civ. P. 52(a); *United States Naval Inst. v. Charter Communications, Inc.*, 936 F.2d 692, 697 (2d Cir. 1991).

First, appellant argues that the district court erred in crediting the auditor's assumptions that work performed by two employees in 1992 was "covered work" — work for which appellant owed contributions to the Fund. The district court was warranted in crediting this assumption, however, because appellant made contributions for these same employees during 1993 and the employees' wages for this work in 1992 were comparable to their 1993 wages.

Second, appellant argues that the district court should have discredited the auditor's testimony that appellant was not "double billed" for these employees' work. Appellant points to the auditor's testimony that he could not be sure, at the time of the hearing, whether he double billed hours. In this same hearing, however, the auditor testified that his

recollection was that, at the time he prepared the report, he deducted any hours for which appellant had already contributed to the Fund in accordance with the auditor's usual practice. The district court did not clearly err in finding this recollection credible.

Finally, appellant argues that the auditor unreasonably considered subcontracted employees' work as covered work, even though the CBA requires the Union to give an employer notice of its obligation to make contributions to the Fund for subcontracted employees' work. The problem with this argument is that it is only an argument, not supported by any evidence that the employees at issue were actually subcontracted. Moreover, appellant's argument is based on a selective reading of the CBA. The relevant provision requires, first, that appellant notify the Union "on a weekly basis . . . of the hours worked by" outside drivers. If the outside drivers' employer does not make the requisite contributions to the Fund, then the Union is required to notify appellant of its obligation to contribute on the outside drivers' behalf. Appellant presented no evidence at the damages hearing that it notified the Union of its employment of outside drivers. Appellant cannot, accordingly, invoke the protection of the above-quoted CBA provision, and the district court did not err in crediting the auditor's testimony that appellant owed contributions for these employees' work.

Accordingly, we affirm the district court's damages award.

CONCLUSION

We therefore affirm.

APPENDIX B — AMENDED FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED AND FILED JANUARY 20, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

95-CV-1406 (NG)

JOHNNIE BROWN, THEODORE KING, ALDO COLUSSI, GEORGE FINCH, CHESTER BROMAN, JOSEPH FERRARA, FRANK FINKEL and ANIELLO MADONNA as Trustees and Fiduciaries of the Local 282 Welfare, Pension, Annuity and Job Training Trust Funds,

Plaintiffs,

– against –

C. VOLANTE CORP.

Defendant.

AMENDED FINAL JUDGMENT

A memorandum and order of the Honorable Nina Gershon, United States District Judge, having been filed on December 22, 1998; having previously granted summary judgment on July 30, 1997, as to liability in favor of the plaintiff Trustees; now adopting in its entirety the September 1, 1998 Report and Recommendation of Magistrate Judge Viktor V. Pohorelsky as to damages, interest and attorneys' fees, and entering judgment in the following amounts:

Appendix B

Past due contributions	$ 78,183.87
Interest (through June 1998)	$ 67,770.08
Liquidated Damages	$ 67,770.08
Attorneys' Fees	$ 39,670.00
Costs	$ 120.00
TOTAL	$248,514.03

plus additional interest on past due contributions of $975.76 for each month from June 1998 through December 1998 for a sum of $6,830.32; plus $975.76 in liquidated damages for each month from and after June 1998 through December 1998 for a sum of $6,830.32; resulting in a sum of $13,660.64; for a TOTAL AWARD of $262.174.67; it is

ORDERED and ADJUDGED that the September 1, 1998 Report and Recommendation of Magistrate Judge Viktor V. Pohorelsky is adopted in its entirety; and, that judgment is entered in favor of plaintiffs and against defendant, C. Volante Corp., as follows:

Past due contributions	$73,183.87
Interest (through June 1998)	$76,770.08
Liquidated Damages	$67,770.08
Attorneys Fees	$39,670.00
Costs	$ 120.00

plus additional interest on past due contributions of $975.76 for each month from June 1998 through December 1998 for a sum of $6,830.32; plus $975.76 in liquidated damages for each month from and after June 1998 through December 1998 for a sum of $6,830.32; resulting in a sum of $13,660.64 for a TOTAL AWARD of $262,174.67.

Appendix B

DATED: Brooklyn, New York
January 20, 1999

s/ Robert C. Heinemann
ROBERT C. HEINEMANN
CLERK OF COURT

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED JULY 30, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

95 CV 1406 (NG)

JOHNNIE BROWN, THEODORE KING, ALDO COLUSSI, GEORGE FINCH, CHESTER BROMAN, JOSEPH FERRARA, FRANK FINKEL and ANIELLO MADONNA as Trustees and Fiduciaries of the Local 282 Welfare, Pension Annuity and Job Training Trust Funds,

Plaintiffs,

v.

C. VOLANTE CORP.,

Defendant.

OPINION AND ORDER

GERSHON, United States District Judge:

This action is brought pursuant to the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), for recovery of delinquent pension fund contributions. The plaintiffs move for summary judgment. The defendant opposes the motion and moves to dismiss the complaint on the ground that the court lacks jurisdiction.

Appendix C

FACTS

The following facts are undisputed. The plaintiffs ("the Trustees") are trustees of the Local 282 Welfare, Pension Annuity and Job Training Trust Funds ("the Funds"), which were established pursuant to collective bargaining agreements between Building Material Local Union 282 of the International Brotherhood of Teamsters ("the Union") and employers who utilize Union labor.

The obligations of the employers with respect to the Funds are set forth in the "Agreements and Declarations of Trust of the Funds" ("the Trust Agreement"). The Trust Agreement specifically defines "employer" in relevant part as "each employer who has duly executed a collective bargaining agreement with the Union." Trust Agreement at 1, Section 1. Pursuant to the Trust Agreement, employers are required to make certain contributions to the Funds based upon the amount of Union labor they use.

The defendant, C. Volante Corp., is a truck rental company located in Lynbrook, New York. Rita Volante was the Chief Operating Officer of the company from 1962 until September 1995, when she suffered an incapacitating stroke. Since Ms. Volante's stroke, her son, Carmine Volante, has, with other relatives, continued the operations of the firm.

Volante Corp. is a signatory to the collective bargaining agreement with the Union that was in effect between July 1, 1987 and June 30, 1990. However, the company is not a signatory to the collective bargaining agreements that were in effect between July 1, 1990 and June 30, 1993 and between July 1, 1993 and June 30, 1996.

Appendix C

On a date not specified in the record, the Trustees made a request to perform an audit of Volante Corp.'s books and records. The company acceded to the request, and the audit was performed on November 5 and December 17, 1993. The audit report, dated October 12, 1994, determined that Volante Corp. was delinquent in contributions to the Funds for the period between May 30, 1990 and September 30, 1993 in the amount of $78,183.87, exclusive of interest.

In a letter to the Trustees, dated January 20, 1995, Rita Volante addressed the issue of the deficiency identified by the audit. Ms. Volante asserted that "the main issue in question" was that Volante Corp. had utilized drivers on a temporary basis who were employees of another trucking firm and was "under the assumption they were paying their own benefits." According to Ms. Volante, after having received a copy of the October 12, 1994 audit, she "further investigated" and found that the drivers "may or may not have paid benefits to the union." Asserting that Volante Corp. was "embarrassed by this occurrence," Ms. Volante declared that the Company realized that it had "a responsibility to the funds." Ms. Volante then offered "the following thoughts":

1. We have not had a signed contract since 1989.

2. We have filed application with a bank to get financing. The maximum we can borrow is $30,000.00.

3. Therefore, would propose a $35,000.00 pay out to cover the total liability to the funds.

4. This proposal is based on the amount C. Volante Corp. could afford without jeopardizing the financial stability of the firm.

Finally, Ms. Volante "enclosed a check for $5,000.00 down as good faith in cementing the relationship of Local 282 and C. Volante Corp." The Trustees rejected Ms. Volante's offer at their February 1, 1995 board meeting and brought this suit on April 7, 1995.

DISCUSSION

A. Volante Corp.'s Motion to Dismiss.

Volante Corp. contends that the court lacks subject matter jurisdiction over this action because the dispute between the parties lies within the exclusive jurisdiction of the National Labor Relations Board ("NLRB"). This argument is without merit.

Volante Corp. relies upon *Laborers Health and Welfare Trust Fund for Northern Cal. v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539 (1988). There, the Supreme Court held that the NLRB exercises exclusive jurisdiction over disputes as to whether an employer has a continuing obligation to make contributions to a union pension fund during the period after the expiration of a collective bargaining agreement, but while negotiations toward a new collective bargaining agreement remain ongoing. The Court was explicit that its holding applied only to this particular type of dispute. Quoting the Ninth Circuit opinion that it affirmed, the Court thus limited its holding to "that narrow

category of suits seeking recovery of unpaid contributions accrued during the period between contract expiration and [an] impasse" of negotiation. 484 U.S. at 545.

The dispute between the Trustees and Volante Corp. is not one to which *Advanced Lightweight* is applicable. There have been collective bargaining agreements in force throughout the time relevant to this action. As will be seen, the issue in this case is not whether Volante Corp. had any obligation to the Funds after the expiration of a collective bargaining agreement, but whether the company is bound by valid collective bargaining agreements to which it was not a signatory. Thus, *Advanced Lightweight* is simply irrelevant to this action, and Volante Corp.'s motion to dismiss must be denied. *See Scarfi v. Bright Star Indus., Inc.*, 779 F. Supp. 687, 689 (E.D.N.Y. 1992) (*Advanced Lightweight* inapplicable to case involving "a still-valid collective bargaining agreement as well as a still-valid trust agreement").

B. The Trustees' Motion for Summary Judgment.

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there in no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Of course, the inquiry as to whether a genuine issue of material fact exists is governed by the principle that "all justifiable inferences" are to be drawn in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Appendix C

A genuine issue, exists, and summary judgment must be denied, "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.* at 248.

The Trustees argue that Volante Corp.'s only defense to liability for delinquent trust contributions is that it did not sign either the 1990-1993 or 1993-1996 collective bargaining agreements and was therefore not an "Employer" during these years within the meaning of the Trust Agreement. This defense fails, the Trustees argue, because, as a matter of law, Volante Corp. adopted and bound itself to both of these collective bargaining agreements through a course of conduct.

An employer who has not formally executed a collective bargaining agreement may still be held to have adopted it through a course of conduct indicative of an intent to be bound by its terms. *See, e.g., Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir. 1988) (citing cases); *UIU Health & Welfare Fund v. N.Y Flame Proofing Co.*, 828 F.2d 79, 83 (2d Cir. 1987).

Volante Corp. was a signatory to the 1987-1990 collective bargaining agreement, and the company acceded without challenge to the Trustees' request for an audit. The audit was conducted for the period between May 30, 1990 and September 30, 1993, a period which embraces all three collective bargaining agreements, the one to which Volante Corp. was a signatory and the two later ones to which it was not. After receiving the audit report for that period, Ms. Volante acknowledged in writing that Volante Corp. had "a responsibility to the funds." Indeed, Ms. Volante strove to

fulfill that obligation by offering the Trustees a proposal to settle the delinquency set forth in the audit report.

The conclusion that Volante Corp. bound itself to the collective bargaining agreements becomes inescapable in light of its submission to the funds of "remittance reports" for sixty-one consecutive months in the period between June 1990 and June 1995. These reports, which have been placed in the record by the Trustees, are employer statements of contributions due to the Funds.

What is more, when he was deposed as Volante Corp.'s corporate representative, Carmine Volante testified that all of the company's drivers are paid union scale; all are members of the Union, or sought to become so, and that all of the company's jobs are union jobs. Deposition of Carmine Volante at 11-12, 16. Further, the Trustees have submitted an unrefuted affidavit establishing that Volante Corp. maintained a surety bond to guarantee payment of contributions to the Funds, which was required by the collective bargaining agreement.

In response, Volante Corp. argues that Carmine Volante testified that he was uncertain of his competency to testify about company affairs because he had only recently taken the helm at the company because of his mother's stroke. But the company offers nothing to counter Ms. Volante's own acknowledgment that Volante Corp. had "a responsibility to the funds." Rather, Carmine Volante now submits an affidavit in which he contradicts the admissions he made at his deposition. However, "a party may not create an issue of fact by submitting an affidavit in opposition to a summary

judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony." *Hayes v. New York City Dept. of Corrections*, 84 F.3d 614, 619 (2d Cir. 1996). To hold otherwise " 'would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.' " *Id.* (quoting *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969)).

Moreover, Mr. Volante offers no elaboration or support for ambiguous statements made in his affidavit, such as thatVolante Corp. did not pay wages "in accordance with the specific provisions" of the collective bargaining agreements or that it did not maintain a surety bond "in accordance with the express provisions" of the agreements. Carmine Volante Affidavit at ¶¶ 8, 11. Similarly, the attempt to minimize the record by stating that "from time to time [Volante Corp.] made sporadic contributions" to the Funds, Carmine Volante Affidavit at ¶ 7, is belied by the undisputed documentary evidence of sixty-one consecutive months of remittance reports.

The single document offered by Volante Corp. to refute the Trustees' contentions does not overcome the undisputed evidence. In a letter of September 12, 1995, the Union informed the company that, "(a)lthough we are aware that your dues and benefit contributions are paid timely and to date," the application of one of Volante Corp.'s drivers to join the Union could not be processed until the company signed the 1990-1993 and 1993-1996 collective bargaining agreements. Volante Corp. offers this as evidence that the Union did not consider the company to be bound by these collective bargaining agreements. Although it is clear from

the letter that the Union wanted Volante Corp. to sign the collective bargaining agreements, the letter does not establish that the Union did not consider the company bound by the collective bargaining agreements. Put another way, in the face of the undisputed evidence, this letter alone is too thin a reed to support a reasonable jury's conclusion that the defendant did not, through a course of conduct, agree to be bound by the collective bargaining agreements.

In sum, there is no issue of material fact with regard to Volante Corp.'s adoption through a course of conduct of an obligation to the Funds under the collective bargaining agreements. The company cannot reap the benefits of a contractual relationship with the Union, including the benefits to its employees arising under the Funds, without fulfilling its obligations under the applicable contracts. Its intent to be bound is clear. The Trustees are therefore entitled to summary judgment.

CONCLUSION

Volante Corp.'s motion to dismiss is DENIED. The Trustees' motion for summary judgment is GRANTED. Since Volante Corp. has yet to produce all pertinent documentation regarding its contribution obligations, the company is ordered to produce such documentation within thirty days so that a further audit may be conducted. Upon completion of this audit, the parties are directed to Magistrate Judge Pohorelsky for a determination of all damages, interest and attorneys' fees to which the Trustees are entitled under ERISA.

Appendix C

SO ORDERED.

s/ Nina Gershon
Nina Gershon
United States District Judge

Dated: Brooklyn, New York
July 30, 1997

APPENDIX D — RELEVANT STATUTES

Section 302(c)(5)(B) of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 186(c)(5)(B)

§ 186. Restrictions on financial transactions

* * *

(c) Exceptions

The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That . . . (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal

office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; . . .

* * *

Section 515 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1145

§ 1145. Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

* * * *